Supreme Court, U.S.
FILED

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No. ___

IN THE

Supreme Court of the United States

OREGON ARENA CORPORATION AND MICHAEL FENNELL,
Petitioners.

v.

DANIEL LEE, MICHAEL CARR, EDWARD GATHRIGHT AND JEREMY SONNIER,
Respondents,

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit correctly held, in conflict with other circuits that have considered the issue, that a private party who regulates speech activities on its premises becomes a state actor under this court's "public function test" thereby subject to liability for civil rights claims under 42 U.S.C. § 1983.

RULE 14.1(b) AND 29.6 STATEMENT

The following are the parties to the proceeding in the Court of Appeals for the Ninth Circuit:

1. Oregon Arena Corporation, an Oregon corporation; defendant-appellee;
2. Michael Fennell, an individual; defendant-appellee;
3. Daniel Lee; plaintiff-appellant;
4. Michael Carr; plaintiff-appellant;
5. Edward Gathright; plaintiff-appellant;
6. Jeremy Sonnier; plaintiff-appellant.

Petitioner Oregon Arena Corporation is not publicly traded, nor is it a subsidiary or affiliate that has issued shares to the public.

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PETITION FOR A WRIT OF CERTIORARI

Oregon Arena Corporation and Michael Fennell respectfully petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-12a) is reported at 276 F.3d 550 (9th Cir. 2002). The district court's opinion (App., 13a-36a,) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 2002. App. *infra*, 1a. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves a claim alleging state action under 42 U.S.C. § 1983, for violation of plaintiffs' First and Fourteenth Amendment rights.

STATEMENT OF THE CASE

Plaintiffs are self-proclaimed street preachers who sued defendants Oregon Arena Corporation, ("Oregon Arena"), and Michael Fennell (the corporation's general counsel) for alleged First Amendment violations in connection with their preaching activities. App., *infra*, 15a. Oregon Arena operates a recreational venue called the "Rose Quarter Commons" which includes restaurants, a concert hall, parking garages, and a sports stadium, which primarily serves as the home stadium for the Portland Trail Blazers professional basketball team. App., *infra*, 17a-18a. Oregon Arena is a private, for-profit business. App., *infra*, 17a. The City owns portions of the real property referred to as the Rose Quarter Commons. App., *infra*, 18a. The Commons is an open-air plaza area surrounding the Rose Garden Arena, Memorial Coliseum, One Center Court and the Garden Garage. App., *infra*, 18a. Oregon Arena owns the Rose Garden Arena, One Center Court and the Garden Garage. App., *infra*, 18a.

The City leased the property to Oregon Arena from January 1993 through June 1997. App., *infra*, 18a. The lease required Oregon Arena to permit access to the Commons for free speech as may be required by law. App., *infra*, 18a. The lease expired, and was not renewed, but Oregon Arena continues to operate the Rose Quarter Commons, renting out portions of it for both private and public events. App., *infra*, 18a.

Pursuant to the lease agreement, general counsel Michael Fennell drafted a "Code of Conduct" and a set of rules titled the "Petitioning and Free Speech Rules." App., *infra*, 18a. The Code prohibits anyone from "yelling or screaming with

the intention of disturbing persons or disturbing lawful assembly" and designates certain areas, available on a first-come-first-served basis, for petitioning and speech activities. App., *infra*, 18a. The Code and the Rules also limit activities to times when the Rose Garden—the sports arena—is open to the public and sets forth other limitations in order to ensure unobstructed crowd control and traffic flow. App., *infra*, 19a.

In-house security officers and a private security agency enforce the Code and Rules. App., *infra*, 19a. Both are instructed by Oregon Arena to enforce the Code and Rules impartially. Over the years, a number of individuals and interest groups have used the designated areas without incident. App., *infra*, 19a. On several occasions, however, patrons at the Commons have been offended by plaintiffs' activities, resulting in potentially violent confrontations between the two. App., *infra*, 19a. Within the year before this suit was filed, plaintiffs had numerous run-ins with Oregon Arena's security officers involving enforcement of the Code and Rules. App., *infra*, 20a.[1]

Plaintiffs brought a claim for injunctive relief and damages against Oregon Arena under 42 U.S.C. § 1983. Plaintiffs alleged that defendant was a state actor under the "public function" test, because by policing the Rose Quarter Commons, Oregon Arena performs a public function in deciding who can use the property. App., *infra*, 29a.

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[1] On several occasions, women attending events at the Rose Garden or Memorial Coliseum complained that plaintiffs called them "whores," "sluts," "prostitutes," "daughters of Babylon" and "Jezebels," and told the women that they "were going to hell." App., *infra*, 21a. Another encounter with the private security force involved complaints from a woman and her daughter after plaintiff Gathright along with another man called the daughter a "whore" because she was wearing shorts and a halter top. The mother shouted at the men and grabbed one of their notebooks; security removed the most verbal man at that point from the scene. App., *infra*, 23a.

The district court held that Oregon Arena was not a state actor under the "public function" test, because plaintiffs failed to show that the City was sufficiently "entwined" with the management or control of the property so as to make Oregon Arena a state actor under *Evans v. Newton*, 382 U.S. 296, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). App., *infra*, 30a. The court relied on the Seventh Circuit decision in *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996), in holding that use of private security force on public property does not transform a private corporation into a state actor. App., *infra*, 32a.

The Ninth Circuit reversed. Relying on a 1990 district court case from the District of Massachusetts, *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace,* Inc., 745 F. Supp. 65 (D. Mass. 1990), the court held that Oregon Arena's regulation of free speech at the Commons was a public function. App., *infra*, 8a. In the *Citizens* case, the court found state action because the public had an easement over the land operated by the private corporation. App., *infra*, 8a.

REASONS FOR GRANTING THE WRIT

This case presents the court with an opportunity to resolve what is now a conflict in the circuits: i.e., when, if ever, the regulation of speech activities transforms the regulator into a state actor subject to liability under 42 U.S.C. § 1983. Prior to the decision in this case, the use of a private security force to regulate conduct on privately controlled, but government owned property, had not resulted in a finding of state action.

The court's decision is in conflict with the decisions of other circuits, and potentially turns any private entity who regulates speech activities on its property into a governmental actor subject liability for civil rights violations. Private entities have long been able to regulate conduct on private property without being subject to claims of First Amendment

violations. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972); *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976). Further review is warranted.

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH OTHER CIRCUITS' ANALYSIS OF STATE ACTION UNDER THE "PUBLIC FUNCTION TEST."

In *Wade v. Byles*, 83 F.3d 902 (7th Cir. 1996), the Seventh Circuit rejected the argument that a private security guard became a state actor under the "public function" test merely because the guard was employed to police a public housing project. *Id.* at 905. Similarly, the Tenth Circuit, in *Gallagher v. Neil Young Freedom Concert*, 49 F.3d 1442 (10th Cir. 1995), held that a company which leased a government-owned facility and provided security during the event did not perform a public function such that it became a state actor under 42 U.S.C. § 1983. *Id.* at 1456. In *National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022 (11th Cir. 1988), the court held that a union which excluded a broadcasting company from a meeting held in a municipally owned facility was not a state actor under the public function test, because the activities of selecting media stations, or leasing space to conduct meetings has never been exclusive functions of the state. *Id.* at 1026.

Each of these decisions followed this court's earlier rulings on what constitutes a public function and when a private party necessarily becomes a state actor. If the state delegates a function that is traditionally and exclusively reserved to the State, then the private party becomes a state actor. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 352, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974). This court's decisions make it clear that this is a difficult test to satisfy. Many functions have traditionally been performed by governments, but very

few have been "exclusively reserved to the State." *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 158, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978). As this court stated in *Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982):

> "Our holdings have made clear that the relevant question is not simply whether a private group is serving a "public function." We have held that the question is whether the function performed has been a traditionally *exclusive* prerogative of the State." *Id.* at 841.

This court has found some functions that satisfy this test—the administration of elections of public officials, *Terry v. Adams*, 345 U.S. 461, 468, 97 L. Ed. 2d 1152, 73 S. Ct. 809 (1953); management of a city park, *Evans v. Newton*, 382 U.S. 296, 298, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966); and management of a company town, *Marsh v. Alabama*, 326 U.S. 501, 505, 90 L. Ed. 2d 265, 66 S. Ct. 276 (1946). The regulation of speech activities has never been held an *exclusive* public function, and private action taken on public property has also never been held to be an *exclusive* public function as required by that test. As discussed above, the other circuits that have addressed the issue have consistently found that private security enforcement on public property does not result in state action.

The Ninth Circuit's decision is at odds with the decisions of the other circuits and expands the narrowly written "public function test" beyond parameters previously established by this court about what functions are truly exclusively reserved to the government.

II. THE DECISION OF THE COURT OF APPEALS IS ERRONEOUS

The Ninth Circuit held that Oregon Arena was a state actor under the "public function" test. *Evans v. Newton*, 382 U.S. 296, 299, 15 L. Ed. 2d 373, 86 S. Ct. 486 (1966). Under this

test, private individuals become agencies or instruments of the State, subject to its constitutional limitations if they are endowed by the State with governmental functions. The function at issue, however, must be both traditionally and exclusively governmental in nature. *Rendall-Baker, supra*, 457 U.S. at 842.

Evans involved a challenge to racial segregation in a city park. The City of Macon had equitable title to the park, as trustees. In attempting to fulfill the grantor's segregation wishes, the city resigned as trustee, and transferred equitable title of the park to a "private" Board of Directors to circumvent a Fourteenth Amendment challenge. *Id.* at 298.

The court acknowledged that the range of government activities is "broad and varied, and the fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions." *Id.* at 298. However, the court found that because the city was entirely responsible for sweeping, manicuring, watering, and maintaining the facility, its appointment of private trustees did not, *ipso facto*, dissipate its status as a public facility. The park was therefore subject to Fourteenth Amendment restraints.

The lesson of this case is clear. Mere transfer of ownership will not alter the character of property, if the state continues to manage it as a public facility. The reverse is equally apparent. Performance of functions, not exclusively governmental in nature by a private party, does not make it a state actor.

The Ninth Circuit also cited *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 2d 265, 66 S. Ct. 276, (1946). That case involved a First and Fourteenth Amendment challenge to enforcement of an Alabama criminal trespass statute. The plaintiff was arrested after attempting to distribute religious

literature on the streets of a corporate owned "company town." In deciding that the plaintiff could distribute literature on the town streets without criminal sanction, the court noted that except for private ownership of the land, the town had all the characteristics of any other town—residential buildings, streets, a sewer system, a sewage disposal plant and a business block on which businesses were situated. "In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that title to the property belongs to a private corporation." 326 U.S. at 502. Since the facilities were built and operated primarily to benefit the public, their operation was essentially a public function and the town was subject to state regulation. *Id.* at 504.

This case presents a different fact scenario—the Rose Quarter Commons consists of privately owned buildings which are sometimes open to the general public and some city-owned property, all controlled by a private for-profit company. No Supreme Court case has yet addressed the issue raised by this case—whether operation and maintenance of property that is in part municipally owned is a function exclusively reserved to the state as required under the public function test. While this court has found some functions that satisfy this test—the operation of the town in *Marsh*, the maintenance of the park in *Evans*, the administration of elections of public officials, *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 2d 1152, 73 S. Ct. 809 (1953), it has declined to find exclusive state functions in a number of situations. *See, e.g., Rendell-Baker v. Kohn*, 457 U.S. 830, 73 L. Ed. 2d 418, 102 S. Ct. 2764 (1982) (the education of children); *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978) (private enforcement of a statutory lien); *Blum v. Yaretsky*, 457 U.S. 991, 73 L. Ed. 2d 534, 102 S. Ct. 2777 (1982) (operation of nursing homes). The safeguarding or

management of public property by a private agency has never been considered an exclusive government function. *See Gallagher v. Neil Young Freedom Concert, supra*, at 1456.

Neither has the regulation or limitation of speech activities ever been considered an exclusive government function. *Hudgens v. NLRB*, 424 U.S. 507, 47 L. Ed. 2d 196, 96 S. Ct. 1029 (1976) (First Amendment inapplicable to privately-owned shopping mall; absence of state action precludes application of constitutional standards); *Lloyd Corp. v. Tanner*, 407 U.S. 551, 33 L. Ed. 2d 131, 92 S. Ct. 2219 (1972) (First Amendment does not apply to private property, private character is not lost merely because public is invited to use property for designated purposes).

The case cited by plaintiffs and relied on by the Ninth Circuit, *Citizens to End Animal Suffering & Exploitation, Inc. v. Faneuil Hall Marketplace, Inc.*, 745 F. Supp. 65 (D. Mass. 1990), held that the Marketplace was a state actor because it was prohibiting protesters from using a public easement, and therefore was functioning like a policeman. *Id.* at 71. As this court pointed out in *Flagg Bros., Inc. v. Brooks, supra*, it "has never considered [whether] the private exercise of traditional police functions [is a public function]." 436 U.S. at 163-64. The other circuits that have addressed the use of private security forces have found no state action. *Gallagher, supra; Wade v. Byles, supra.*

In a recent Oregon Supreme Court decision also involving Oregon Arena, the court held the security forces employed by Oregon Arena were not fulfilling a "public duty" in exercising their authority over crowds at the Arena for purposes of a common law wrongful discharge claim under Oregon law. *Babick v. Oregon Arena Corp.*, 333 Or. 401, 409, 40 P.3d 1059 (2002).

The Ninth Circuit's decision conflicts with other circuits regarding the use of private security forces, and creates new liability under the public function test for any entity that

either leases or controls public property. This court has never interpreted the test this broadly, and in prior decisions has consistently pointed out the need to analyze the function in terms of whether it is truly an exclusive government function. Until this decision, neither the use of private security forces on public property nor regulation of speech activities has been considered an exclusive government function. This case presents this court with the opportunity to clarify the public function test.

CONCLUSION

For the above reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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